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April 15, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 18, 2004

Case No.: TIA-0167

XXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the Appeal should be denied.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a) (2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Applicant was employed as a lab technician, maintenance electrician and firefighter at the Oak Ridge Gaseous Diffusion Plant (the plant). He worked at the plant for approximately 28 years, in periods ranging from 1973 to 2002.

The Applicant filed an application with the OWA, requesting physician panel review of his prostate cancer. The Applicant claims that his illness was due to exposures to toxic and hazardous materials during the course of his employment. The Physician Panel listed a number of toxic substances and found that there was insufficient evidence establishing a link between the exposures and the Applicant's prostate cancer. The Panel cited references stating that they show that "radiation exposures to the prostate have demonstrated significant resistance to malignant change." See Panel Report at 2. The Panel also stated there was no established relationship between polychlorinated biphenyls (PCBs) and prostate neoplasm. See Physician's Panel Report at 2. The Panel rendered a negative determination, which the OWA accepted.

Subsequently, the Applicant filed the instant appeal. In his appeal, the Applicant alleges that his illness was caused by exposure to ionizing radiation, solvents, PCBs and other chemicals at the plant. With respect to radiation exposure, the Applicant indicates that the Panel determination is consistent with a National Institute of Occupational Safety and Health dose reconstruction. The Applicant claims, however, that the Panel's negative determination is based solely on exposures above set limits and does not take into account the fact that many studies have shown that low dose exposure plays a significant role in cell damage and mutation. The Applicant also states that research has shown that hormone levels are increased by PCBs and that testosterone is directly linked to prostate cancer growth. See Applicant's Appeal Letter.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

The Applicant's arguments do not provide a basis for finding Panel error. As mentioned above the Panel addressed the claimed condition, made a determination, and explained the basis of the negative determination. In making its determination, the Panel applied the correct standard, *i.e.*, "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to, or causing the illness." See Panel Report at 1; 10 C.F.R. 852.8. The Applicant's argument -- that the Panel's references to medical literature did not include certain studies -- is a disagreement with the Panel's medical judgment on the significance of radiation and PCB exposure in general and in this case. A disagreement with the Panel's medical judgment does not indicate Panel error.

As the foregoing indicates, the appeal should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0167, be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: April 15, 2005